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Supreme Court of the United States.

OCTOBER TERM, 1901, No. 274.

MOBILE TRANSPORTATION COMPANY,
PLAINTIFF IN ERROR,
VS.
CITY OF MOBILE,
DEFENDANT IN ERROR.

SUPPLEMENTAL BRIEF BY HARRY T. SMITH AND GREGORY L. SMITH, FOR THE DEFENDANT IN ERROR.

COMMERCIAL PTG. CO., MOBILE.

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Much is contained in the brief for the plaintiff in error which is calculated to mislead the court as to the history of this litigation; as to the physical conditions existing at Mobile, and as to the state of the decisions of the Supreme Court of Alabama.

It is stated on the second page of this brief, and as a part of the facts in this case, that soon after the passage of the act of January 31, 1867, by which the State of Alabama conveyed to the city of Mobile, the shore of the Mobile river, the city of Mobile undertook to interfere with the owners of *all* of the private wharves in front of the city, and that thereupon an injunction was obtained from the United States Circuit Court by which the city of Mobile was forever enjoined from ever asserting any title under this act. One would suppose from the statement not only

that this fact appeared from the record in this cause, but that the litigation and decree referred to involved the property which is now in question. The contrary is the fact. The litigation referred to by the plaintiff in error had no reference whatever to the land involved in this suit; was not pleaded as *res judicata*, and is not shown by the record in this cause. An examination of the record in the case of Leverich vs. The City of Mobile, Supreme Court of the United States, October Term, 1874, No. 2, will show that it involved an entirely different tract of land from that which is now in question. It is true that the opinion rendered by the District Judge in that case, declared every principle of law adversely to our contention, as well as contrary to an overwhelming line of decisions of this court, both prior and subsequent thereto, and that the appeal to this court was dismissed under an agreement of compromise. The decision constitutes a precedent which the plaintiff in error might have cited as an authority upon the points involved. It ought not to have been stated, however, as a part of the facts of this case. The land which was involved in that case was never acquired by the State as we understand the matter, but, on the contrary, is supposed to have passed to private owners by virtue of valid and complete Spanish grants prior to the admission of the State into the Union. This probably accounts for the fact that those who claim the shore which is involved in this litigation, and that south thereof, as well as those who claim the shore in front of the city lying between the One and Three-Mile Creeks did not join in this litigation, but that the bill was filed by the claimants of only a restricted limit, as will appear by reference to the maps on file in the Leverich record. For what legitimate purpose the plaintiff in error could have inserted this precedent as a part of the facts of this particular case, we are unable to understand.

Much has been said in the brief for the plaintiff in error as to the improvements and upbuilding of the shore in front of the City of Mobile, based upon the faith of the ownership of the shore, by

the abutting proprietors. We do not know to what extent this court will go in taking judicial knowledge of the physical conditions at Mobile, but if those physical conditions are known to this court, it is perforce the truth that must be known, which is that the shore of the Mobile River has been largely built up and improved in that district which was covered by the decision in the Leverich case, but that shore which lies north and the shore which lies south of this district, and which includes the land in question, remains to-day almost wholly unwharfed and but little improved.

There is, and there has been, for a great number of years, in the Supreme Court of Alabama, an established rule as to the extent of grants upon navigable streams, whereby a grant which is bounded by a non-tidal stream is to be construed as intending to grant to the low water mark; while a grant upon a tidal stream is to be construed as intending to grant only to the high water mark. This distinction is of universal recognition, as we have undertaken to show in our original brief upon this subject. It is our present purpose, however, only to demonstrate the inaccuracy of the statement of the plaintiff in error to the effect that the decision of the Supreme Court of Alabama in the present case, limiting the title of the upland owner to high water mark, is a departure from the previous decisions of the Supreme Court of Alabama upon the same subject. In doing this, we shall have occasion to show that the plaintiff in error has, in discussing the authorities, entirely lost sight of the distinction above referred to, and cited the cases wholly without discrimination.

The first expression upon this subject that we have found in the opinion of the Supreme Court of Alabama, is contained in the case of Hagan vs. Campbell and Cleveland, 8 Port., page 24, where it is said: "It appears that the land was situated in the then district of Mobile and on the west side of the Mobile river. The rights of riparian owners are diverse, depending upon the fact whether the land is bounded on a river where the tide ebbs and flows, or whether it lies along a stream above tidal water. In the

former case, the right of the soil, according to the common law, extends but to high water mark. The shore below the common tide belongs to the public, and by a grant it may become the property of a citizen."

The same point was next decided in the case of City of Mobile vs. Eslava, 9 Port., 577. We find it re-decided in Goodtitle vs. Kibbe, 1 Ala., 403, Kennedy vs. Beebe, 8 Ala., 914 and Pollard vs. Greit, 8 Ala., 941.

The same doctrine has also been upheld in this court in applying the Alabama rule to the title to the shore of the Mobile river.

Pollard vs. Hagan, 3 How., 212.
Goodtitle vs. Kibbe, 9. How., 471.
Hallett vs. Beebe, 13 How., 25.

In the case of Mobile vs. Hallett, 16 Pet., 266, this court pointed out the fact that such was the established rule in Alabama. It was there said: "A primary rule of construction, according to the English common law as applicable to grants of land made by the government to individuals, when they front on the shores of tide-waters, is, that they go no further than ordinary high-water mark; and if the grant extends over the tide-water, taking the high land on both sides, the land under water does not pass by the ordinary terms of grant, applicable to high lands; because the soil under tide-waters is a public sovereign right, and an estate to itself, in the sovereign, held in trust for the public use, separate from the highland. This is the settled doctrine in England, as will be seen by the case of the Royal Fishery of the Baune, 8 James 1, reported by Sir John Dory, 149; and by Angel, in his Treaties on Tide waters, App. 35, Ed. of 1826.

"The case was recognized as sound law by the court of King's Bench, in Carter vs. Muscott, Burr. Rep. 2162, in which it is said, 'That navigable rivers, or arms of the sea, belong to the Crown, and not like private rivers, to the landowners on each side; and therefore the presumption lies the contrary way in the one case from which it does in the other. Here, indeed, it lies

prima facie, on the side of the king and the public.' 'The case of the Royal Salmon Fishery in the river Baune, in Sir John Dory's Reports, is agreeable to this; and it is a very good case.'

"The same doctrine has been maintained in Massachusetts, as will be seen by the case of Storer vs. Freeman, 6 Mass. Rep., 435. In that State, a local peculiarity exists which is explained by the court.

"So in New York. Palmer vs. Hicks, 6 Johns, 133; Mayor, &c., of New York vs. Scott, 1 Caines' Rep., 355. And in many subsequent cases this rule of construction is recognized.

"I understand the same rule to apply by force of the laws of Spain, to the Spanish grant under which the defendant Hallett claims. So the Supreme Court of Alabama held in Hogan vs. Campbell, 8 Porter's Ala. Rep. 1, 24. And see Mayor, &c., of Mobile vs. Eslava; opinion of Supreme Court of Alabama. And I feel disinclined on this point to look beyond the decisions of the State Court of Alabama; if power to look beyond it exists in this court, on this particular point; which I doubt."

It is not at all difficult, therefore, to understand why the Supreme Court of Alabama should, in their opinion in the case at bar have said that the authorities cited by the plaintiff in error "In no wise conflict with the common law rule so often approved by this court, and other jurisdiction that on streams where the tide ebbs and flows grants of adjoining land only extend to the ordinary high tide line along the shore."

Speaking of this subject, the plaintiff in error says in his brief, page 27: "Had this (the case at bar) been the first decision involving the riparian lands of Mobile river, conceding that Mobile river is a river, with tides such as the courts of England had in mind when framing the rule as to the line of water to which private ownership extends, the decision would be unassailable in this court."

"But in the face of the long list of decisions of the same court practically recognizing the rule of Webb vs. Demopolis, as ex-

tending the whole length of Mobile river, as well as the extent of Spanish, French and English grants to the channel of the river and also the right of private owners to lands reclaimed from the river far below high-water mark, this decision comes as an assault upon vested rights and as depriving the plaintiff in error of property without due process of law and without due compensation."

In view of the above quotation and in view of the assertion frequently reiterated in the brief for the plaintiff in error to the effect that the established rule in Alabama has always extended the upland owner's line to the lower water mark, it is interesting to observe that the plaintiff in error has not been able to cite a single authority in the Supreme Court of Alabama or the Supreme Court of any other state, or from any English court, holding that the upland owner upon a tidal stream takes below high water mark. This an examination of the authorities cited by the plaintiff in error upon this point will demonstrate. The three cases of McGee vs. Hallett, 22 Ala., 699, Hagan vs. Campbell, 8 Port., 9, and Hall and Walker vs. Hunt, 7 Ala., 882, all involved a construction of the same Spanish grant, and held simply that the language of the particular grant then under discussion explicitly extended the boundaries of the grant to the channel of the river. This is true not only of the grant which the court was then considering, but Spanish grants to several other tracts in Mobile, which explains the fact pointed out by the plaintiff in error that much of the eastern portion of the city of Mobile is built upon made land. The fact, however, that the grant considered in the three cases mentioned and several other grants, instead of bounding the land by tidal stream, explicitly stated that it should extend to the channel of the river, and the holding that these grants were valid, since they were made prior to the acquisition of the territory by the United States and prior to the admission of the state into the Union, throws no light whatever upon the inquiry as to whether the United States could convey the title below high water mark after the state obtained the title, nor upon the question as

to a proper construction of a grant in which the tidal stream is set down as a boundary line. In Goodtitle vs. Kibbe, 9 How., 471, and again in Shively vs. Bowlby, 152 U. S., 28, it was pointed out that the United States might have granted the shore or confirmed a Spanish grant to the shore before the state became a member of the Union, but that this was not in conflict with the holding that the United States' government could not do so after the state acquired the title.

The case of Doe (Kennedy) vs. Jones, 11 Ala., 63, like the three cases already mentioned, simply involved the construction of a grant to the soil below high water mark which had been made by the Spanish government long before the Treaty under which the United States obtained the title to the property in question, and this decision was simply to the effect that a transfer of the possession of Mobile to the United States did not interfere with the title already granted below high water mark. The case involved neither a construction of a grant bounded by a tidal stream, nor the power of the United States to grant the shore subsequent to the admission of the state into the Union.

The case of the City of Mobile vs. Eslava, 9 Port., 577, not only did not decide that such a grant would extend to low water mark, but decided explicitly on the contrary that the shore vested in the state.

The case of Webb vs. Demopolis, 95 Ala., 116, and the same case in the 87 Ala., 670, involved the title to the bank of a non-tidal stream. We have already in our previous brief pointed out that none of the following cases touches upon this subject.

Williams vs. Glover, 66 Ala., 189.
Howard vs. Ingersoll, 17 Ala., 790.
Bullock vs. Wilson, 2 Port., 445.
Former Brief pages 21, 22 and 23.

The case of Bayzer vs. McMillan, 105 Ala., 395, was an action for damages for obstructing a non-tidal creek, and throws no light upon the subject.

The case of Sullivan vs. Spottswood, 82 Ala., 163, did involve a boom upon a tidal stream, but the question of ownership of the soil was not involved. This case involved simply the question as to whether the lessee of a certain boom was thereby estopped from asserting that the stream was a navigable stream, and the case involved simply the construction of the lease and not the title of the lessor to the property. The lessee could not, of course, dispute the right of the lessor. Neither the state nor any person claiming under the state was contesting the right of the lessor.

It will be observed, therefore, that no authority has been cited upholding the contention of the plaintiff in error that the low water mark has been held in Alabama to constitute the boundary line upon a tidal stream.

TIDE DOES EBB AND FLOW IN MOBILE.

The plaintiff in error has devoted pages 28-33 of its brief to the contention that the Mobile river is not a tidal stream, and has taken great pains to demonstrate that while the tide ebbs and flows in the Mobile rivers, the ebb and flow does not cover any large tract of land. The complaint in this case involves only the land between the high-water and the low-water mark. If there is no such land, the plaintiff in error has brought this case to the Supreme Court of the United States in order to defeat a foolish claim to nothing. That the tide does ebb and flow at Mobile is a fact of which the Supreme Court of Alabama, as well as the Supreme Court of the United States, have taken judicial knowledge in a great many cases.

City of Mobile vs. Eslava, 9 Port., 577.
Kennedy vs. Beebe, 8 Ala., 909.
Pollard vs. Greit, 8 Ala., 943.
Pollard vs. Hagan. 3 How., 212.
Goodtitle vs. Kibbs, 9 How., 471.
Hallett and Walker vs. Beebe, 13 How., 25.
Sullivan vs. Spotswood, 82 Ala., 163.
Boulo vs. The N. O. R. R. Co., 55 Ala., 480.
Pollard vs. Files, 2 How., 607.
Mobile Trans. Co. vs. City of Mobile, being the case at bar.

These cases settle beyond peradventure that the owner of the upland under a patent bounding the lands upon Mobile river, has never been permitted by the State to take below high-water mark. The question as to how far an upland owner shall be permitted to take is a question of State policy, and wherever it is permitted to take below high water mark, it is a matter of gratuity from the State, so that it would be perfectly competent for the State to say that the upland owner may extend his holdings to the low-water mark upon one stream, but that the upland owner on another stream of identically the same character should not extend beyond high-water mark, and this regardless of the ebb and flow of the tide in either stream. One citizen might perhaps complain that there was no just distinction between himself and his neighbor, and that the policy of the State should be the same upon both streams, but the fact that the State had been more generous to the owners of land upon one stream than to the owners of land upon another stream would not confer any jurisdiction upon this court to correct the policy, so that the material question is not why the State of Alabama has permitted the owners upon other streams or at other points to extend their land to low-water mark, while permitting the upland proprietor at Mobile to extend only to high-water mark. The only question really is has such been the policy of the State? That the tide does ebb and flow at Mobile is, however, set down on every chart which we have seen and is known to every man who is informed upon the subject.

The plaintiff in error has cited the case of San Francisco vs. Leroy, 138 U. S., 656, in support of its contention that the title to the shore of Mobile river did not pass to the state when Alabama became a member of the Union, because as they insist Mobile river is not a tidal stream. The rule which began with Pollard vs. Hagan, 3 How., 212, and which has ever since been adhered to, established that the state retained the title to the bed and shore of all navigable streams whether they were tide water streams or not, and the case of San Francisco vs. Leroy, as we understand it,

simply distinguishes the shore below high water mark and certain flats which were properly classed as swamps and overflow lands. The rule that the question as to how far the title upon upland owner upon navigable streams shall extend, even where the tide does not ebb and flow, has been frequently announced in this court.

St. Anthony Falls Water Co. vs. St. Paul Water Commrs., 168 U. S., 349.
I. C. R. R. Co. vs. Illinois, 146 U. S., 517.
St. Louis vs. Ruiz, 138 U. S., 250.
Barney vs. Keokuk, 94 U. S., 324.

THE ACT OF JANUARY 31ST, 1867, CREATED A TRUST.

The plaintiff in error next points out the fact that the act of 1867 conferred the title upon the City of Mobile in trust for the public, and the further fact that the Legislature of Alabama have, by several of its acts, recognized the existence of a private ownership of wharves at Mobile.

The first suggestion has been fully answered by the opinion of the Supreme Court of Alabama in this case. Conceding that the act of January 3, 1867, conferred the title upon the city in trust, as stated in the Act itself, "To hold, possess, direct, control and manage the shore and soil in such manner as they might deem best for the public good," this constitutes no reason why the plaintiff in error should be permitted to withhold to its possession, so that the city of Mobile could not "hold, possess, etc.," as it might think best for the public good. To say that the city holds as trustee, is not to deny its right of possession.

The case of the Mayor of Mobile vs. Moog, in the 53rd, Ala., 568, has been cited to establish that the purpose of this act was to "Transfer the right and power of the state in and over the shore of the river and the soil under it in front of Mobile to that city, to be exercised by it as the state should exercise it for the general good in ***preventing the navigability of the river from being impaired and in restraining purpestures along the river front***

and below high water line by describing the manner in which and the extent to which wharves and other structures should be built into and over the water." From this construction of this act, the Supreme Court, in the present case, has not departed, but the trust would be wholly inoperative and the power of the city nothing, if the defendant and other persons who felt so disposed, could take the adverse possession of this shore from the city, and hold it in defiance of the right conferred upon the city in the terms of the act "To hold, possess, direct, control and manage the shore and soil therein granted." In our original brief we have cited a vast array of authority to the proposition that the state possessed the power to confer upon the city or upon any individual the absolute title to the shore, and that the act of 1896 was, therefore, a valid exercise of its discretion. The question, however, is not involved in the present appeal, since the right of possession in the city exists and is of equal force, whether the city holds in trust or in fee simple, and whether it can convey an interest therein to other persons or not.

The question as to whether the State can convey the title to the shore to third persons has never been before the Supreme Court of Alabama, so far as we know.

THERE ARE PRIVATE WHARVES IN MOBILE.

It is indisputably true that there exists in Mobile many wharves which are the private property of citizens. This arises from the fact that there were certain grants both French and Spanish which were entirely complete prior to the inception of the title of the United States Government. This is fully demonstrated by the cases already referred to of McGee vs. Hallett, 22 Ala., 699; Hagan vs. Campbell, 8 Port., 9; Hall and Walker vs. Hunt, 7 Ala., 882 and Doe vs. Jones, 11 Ala., 863.

Besides this, other portions of the shore may have been acquired from the State of Alabama since it acquired the title thereto.

It is not peculiar, therefore, that the Legislature of Alabama should have found it necessary or proper to pass numerous acts for the government of the wharf property in Mobile fully recognizing that private ownership existed. This, of course, does not tend to show that all of the shore in front of Mobile was held by private owners, nor that the plaintiff in error has any title to the particular land in controversy.

DUE PROCESS OF LAW.

The plaintiff in error devotes pages 35-39 of his brief to the contention that it has been deprived of this property without due process of law. Exactly what is meant by this we do not pretend to understand, unless it is supposed by the plaintiff in error that every erroneous decision constitutes a confiscation of property without due process of law. In other words, the argument of the plaintiff in error seemed to be about as follows: The land sued for was my property; the Supreme Court of Alabama has decided that it was not my property; therefore, the decision of the Supreme Court of Alabama took my property from me with compensation, and without due process of law.

STATUTE OF LIMITATIONS.

The argument in regard to the statute of limitations has been fully answered in the original brief. We desire, however, at this time to deny the plaintiff in error's statement contained on page 42 of his brief, that the court excluded the testimony of the plaintiff in error tending to show that Bernody had been in the adverse possession of this property for 75 years. The court declined, it is true, to permit testimony of adverse possession offered without indication as to what time it had reference to, but the plaintiff in error made no offer whatever of any evidence relating to any period prior to the conveyance by the State to the city.

RIPARIAN RIGHTS IN ALABAMA.

Under the heading of riparian rights in Alabama, the plaintiff in error has cited several cases which, when properly understood, are wholly inapplicable. The doctrine of accretions has nothing to do with this case, as this case involves only land between the channel of the river and the present high water mark. We have in our previous brief undertaken to show, however, that the right of accretions can be cut off by the State at any time prior to their formation, and that none of the cases awarding accretions to the upland owner involved controversies between the State and its grantee, on the one part, and the owner of the upland on the other, arising before the formation of the accretions. The case of Miller vs. Collum, 4 Ala., 582, was a controversy between individuals in which the upland has never been separated from the shore, and in which the right to the accretions formed necessarily belonged to the owner of the upland. The case of Hagan vs. Campbell, 8 Port., 33, which has been so persistently cited by the plaintiff in error, involved, as we have already had occasion to point out, a complete grant by the Spanish government in express terms to the channel line by which the title passed to the grantee prior to the acquisition of the territory by the United States, so that no question of the State's title was ever involved. The case of Hallett vs. Hunt, 7 Ala., 882, involved identically the same grant. The case of Compton vs. Hankins, 90 Ala., 414, involved the right of wharfage upon a navigable stream far above the ebb and flow of the tide, and is to be classed with Webb vs. Demopolis, referred to in the opinion of the Supreme Court in the present case and fully discussed in our original brief.

The case of Boulo vs. New Orleans Railroad Company, 55 Ala., 489, is not in point, and decides only that the wharf in that case has never been held adversely and belonged to neither party in the case.

LEGISLATION AS TO CITY OF MOBILE.

In discussing the 9th and 15th specifications of error, much has been said in the brief of counsel as to the effect of the Act of Alabama approved February 11, 1879, and entitled "An Act to vacate and annul the charter and dissolve the corporation of the City of Mobile and to provide for the application of the assets thereof in discharging the debts of such corporation. The effect of this act was argued and decided by the Supreme Court of Alabama, but it is not here presented by any specification of error. The 9th and 15th specifications of error refer to an entirely different act, namely, to the recent charter of the City of Mobile. The question presented upon the two acts, however, is the same, and has been fully discussed in our previous briefs upon the subject. It may be remarked, however that the effect of the identical act discussed by the plaintiff in error came before this court in the case of Mobile vs. Watson, 116, U. S., 301, and was there fully determined in accordance with our contention.

SPANISH GRANT.

In briefing this case originally, we had not supposed that it would be seriously contended that the plaintiff in error held under a complete and valid Spanish grant, and perhaps treated this subject with too little care. We beg, therefore, to supplement our former brief upon this point.

The Supreme Court of Alabama will never look beyond the record which is before it in order to ascertain what evidence was introduced in the lower court. By a reference to page 46 of the record, it will be seen that the bill of exceptions simply recited that the plaintiff in error offered in evidence certain portions of the American State Papers, but did not set forth the contents thereof. Under the practice in Alabama, the Supreme Court could not look beyond this bill of exceptions in order to ascertain what was contained in the document thus referred to. The plaintiff in error has

undertaken to overcome this difficulty by inducing the Chief Justice of the Supreme Court of Alabama to certify, record page 18, the contents of the American State Papers. The Chief Justice of the Supreme Court of Alabama, however, has no power to add to the record upon which the Supreme Court of Alabama acted, nor can this court, in reversing the Supreme Court of Alabama, base its judgment upon facts which were not before tee Supreme Court of Alabama, and which appeared only from ex parte certificate of the Chief Justice of the State.

When, however, we look at the contents of the American State Papers, as certified by the Chief Justice, we find that the report of the Commissioner therein set forth does not, in any manner, describe the lands to which it refers, and that the land referred to in the field notes made in 1835, record pages 22-23, are in no manner, identified with the land which is the subject matter of this litigation. If we could concede that the contents of these state papers and the field notes in question show a complete Spanish grant to Bernody, they would, nevertheless, be wholly irrelevant and immaterial to our inquiry. It will be observed that the land referred to in this respect, as well as that described in the field notes, is bounded by the Mobile river. A Spanish grant bounded by a navigable stream where the tide ebbs and flows confers title only to high water mark. A perfect Spanish grant confers title only down to high water mark. In the case of City of Mobile vs. Hallett, 16 Peters, 266, it is said: "A primary rule of construction, according to the English common law as applicable to grants of land made by the government to individuals, when they front on the shores of tide-waters, is, that they go no further than ordinary high-water mark: * * * * * * *

"I understand the same rule to apply by force of the laws of Spain, to the Spanish grant under which the defendant Hallett claims. So the Supreme Court of Alabama held in Hogan vs. Campbell, 8 Porter's Ala. Rep. 1, 24. And see Mayor, &c., of Mobile, vs. Eslava; opinion of Supreme Court of Alabama. And

I feel disinclined on this point to look beyond the decisions of the State Court of Alabama; if power to look beyond it exists in this court, on this particular point; which I doubt."

But this suit does not involve any land above high water mark, and, therefore, would have no reference whatever to the land covered by the Spanish grant, if there had been one.

We observe that the plaintiff in error had cited the cases of Hagan vs. Campbell, 8 Port., 9, and Hallett vs. Hunt, 7 Ala., 882, as holding that a Spanish grant bounding the land by a navigable stream, extends to low water mark or the channel of the river. An examination of these cases, however, will demonstrate that they did not, in any manner, involve the question as to how far a Spanish grant extends when it simply names the navigable streams as a boundary line, but involves the simple question as to whether under the particular grant which the court was then considering, the language was not so explicit as to show that it was the intention of the Spanish government to depart from its general rule, and to convey the land below high water mark.

If we ignore all this, and look into the state papers, this evidence establishes that the commissioner made the report therein contained, but does not establish the truth of any fact stated in the report.

Watkins vs. Holman, 16 Pet., 25.
Chastang vs. Dill, 19 Ala., 421.

Nor did the commissioner report that any Spanish grant ever existed, but, on the contrary, simply reported, record page 19, that Bernody claimed 600 arpens of land on the Mobile river, and that this claim was founded "as the claimant supposed on grants lost by time or accident. The recommendation was not for a confirmation of the grant, but for the confirmation of a reasonable quantity of land." Nor was this land confirmed by the act of March 3, 1819, as it would have been, had the grant been reported as complete, but, on the contrary, the matter was again referred

to another commissioner, and was again reported on November 16, 1820.

3rd Vol. Amer. State Papers, pp. 392-400.

It is stated by the plaintiff in error, that so long as Spain had the actual occupancy of the territory in which Mobile is located, it had the power to grant away the lands, and such grants would be valid as against the title of the United States' government, and superior to the title of the states to the shore and bed of navigable streams.

The case of Cousins vs. Blanc's Executors, 19 How., 202, appears to us to be conclusive upon the point that the Spanish grant of an undefined territory, to the identification of which a survey was necessary, could not be a complete Spanish grant, and cannot operate to pass title until it was confirmed, and could not therefore, operate to defeat the title granted by the United States government in the meantime.

It is, too, we think thoroughly settled, that an incomplete Spanish grant passed no title until confirmed, and then only such title as the United States government had at the date of the confirmation, and that where, as in this case, the confirmation is subsequent to the admission of the state into the Union, no title whatever passes thereby.

City of Mobile vs. Eslava, 9 Port., 577.
Goodtitle vs. Kibbe, 1 Ala., 403.
Kennedy vs. Beebe, 8 Ala., 909.
Pollard vs. Greit, 8 Ala., 941.
Pollard vs. Hagan, 3 How., 212.
Goodtitle vs. Kibbe, 9 How., 478.
Hallet vs. Beebe, 13 How., 25.
Pollard vs. Files, 3 Ala., 49.

In Shively vs. Bowlby, 152 U. S. page 28, it is said: "So much of the reasoning of the learned justice, as implied that the title in the land below high water mark could not have been granted away by the United States after the deed of cession of the territory at and before the admission of the state into the Union, was not necessary to the decision, which in-

volved on a grant made by Congress after the admission of Alabama, and which was followed into two similar cases in which Congress, after the admission of the state, had undertaken to confirm Spanish grants, made after the treaty of San Idlefonso of 1800, and therefore passing no title whatever. Goodtitle vs. Kibbe, (1850) 9 How., 471; Hallett vs. Beebe (1851), 13 How., 25. In the first of these cases, Chief Justice Taney, speaking for the whole court, of which Mr. Justice McKinley, was still a member, said: 'Undoubtedly Congress might have granted this land to the patentee, or confirmed his Spanish grant, before Alabama became a state. But this was not done. And the existence of this imperfect and inoperative Spanish grant could not enlarge the power of the United States over the place in question after Alabama became a state, nor authorize the general government to grant or confirm a title to land when the sovereignty and dominion over it had become vested in the state.'" 9 How., 478.

We submit therefore:

1. That there is no evidence whatever of any Spanish grant, complete or incomplete, to the land in question.

2. That a Spanish grant, had it existed, would have extended only to high water mark.

3. That it being undefined, a Spanish grant could not pass title until a survey was had, and that the survey having been subsequent to the date when the title passed to the State could not operate to deprive the State of its title.

4. That the confirmation of the grant by the United States government having been necessary to its vitality, and not having taken place until after the State had acquired its title, it could not pass the title of the United States government to that with which it had already parted.

Respectfully submitted.

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